

86 - 1576

Supreme Court, U.S.
FILED

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JOSEPH F. SPANIOL, JR.
CLERK

NO.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1986

CHARLES E. WOLFE,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT**

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QUESTIONS PRESENTED FOR REVIEW

1. Does the judicial branch of the U.S. Government have legal authority to amend the laws of the U.S. Congress?

Stated another way, does a U.S. Court of Appeals have the legal authority to hold that a Levy served on an American citizen pursuant to Section 26 U.S.C. 6331(a) is a valid Levy even though such an individual was never assessed for the taxes in issue and was never served with a notice and demand for payment of the taxes whereas Section 6331(a) provides that before serving such a Levy an individual must first be served with a notice and demand for the payment of the taxes and before serving such a notice and demand for payment of taxes the individual must first be assessed for the taxes pursuant to 26 U.S.C. 6201(a)(1)?

2. Does a U.S. Court of Appeals have legal authority to overrule a decision of the U.S. Supreme Court?

Stated another way, the U.S. Supreme Court, in *U.S. v. National Bank of Commerce*, 86 L Ed 565 (1985), has clearly and definitely distinguished between a Levy served pursuant to 26 U.S.C. 6331(a) and a Notice of Levy served pursuant to 26 U.S.C. 6332(a), whereas the 9th Circuit, in this case, held that a levy and a notice of levy are not distinct and in so holding has the 9th Circuit decided a federal question in conflict with this Supreme Court case?

3. Can a human being be an "alter ego" of his solely owned corporation or is this a legal impossibility?

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OPINION BELOW

The opinion of the U.S. Court of Appeals of the Ninth Circuit was filed on August 29, 1986 (p. 18). An order amending the opinion and denying a petition for rehearing was filed on December 29, 1986 (p. 24).

JURISDICTION

The date of the opinion of the Ninth Circuit was August 29, 1986, and the date of the order denying a timely filed petition for rehearing was December 29, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). Pursuant to 28 U.S.C. 2101(c), a petition for certiorari in a civil case can be filed within 90 days after an order denying a petition for a rehearing by a U.S. Court of Appeals.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution

AMENDMENT IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The following section of 28 U.S.C.:

SECTION 1346. UNITED STATES AS DEFENDANT.

(a) The district courts shall have original jurisdiction, concurrent with the United States Claims Court, of:

(1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws;

The following sections of 26 U.S.C.:

SECTION 6201. ASSESSMENT AUTHORITY.

(a) **AUTHORITY OF SECRETARY**—The Secretary is authorized and required to make the inquiries, determinations, and assessments of all taxes (including interest, additional amounts, additions to the tax, and assessable penalties) imposed by this title, or accruing under any former internal revenue law, which have not been duly paid by stamp at the time and in the manner provided by law. Such authority shall extend to and include the following:

(1) **TAXES SHOWN ON RETURN**—The Secretary shall assess all taxes determined by the taxpayer or by the Secretary as to which returns or lists are made under this title.

SECTION 6301. COLLECTION AUTHORITY.

The Secretary shall collect the taxes imposed by the internal revenue laws.

SECTION 6303. NOTICE AND DEMAND FOR TAX.

(a) **GENERAL RULE**—Where it is not otherwise provided by this title, the Secretary shall, as soon as practicable, and within 60 days, after the making of an assessment of a tax pursuant to section 6203, give notice to each person liable for the unpaid tax, stating the amount and demanding payment thereof. Such notice shall be left at the dwelling or usual place of business of such person, or shall be sent by mail to such person's last known address.

SECTION 6331. LEVY AND DISTRAINT.

(a) **AUTHORITY OF SECRETARY**—If any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand, it shall be lawful for the Secretary to collect such tax (and such further sum as shall be sufficient to cover the expenses of the levy) by levy upon all property and rights to property (except such property as is exempt under section 6334) belonging to such person

or on which there is a lien provided in this chapter for the payment of such tax. Levy may be made upon the accrued salary or wages of any officer, employee, or elected official, of the United States, the District of Columbia, or any agency or instrumentality of the United States or the District of Columbia, by serving a notice of levy on the employer (as defined in section 3401(d)) of such officer, employee, or elected official. If the Secretary makes a finding that the collection of such tax is in jeopardy, notice and demand for immediate payment of such tax may be made by the Secretary and, upon failure or refusal to pay such tax, collection thereof by levy shall be lawful without regard to the 10-day period provided in this section.

(b) **SEIZURE AND SALE OF PROPERTY**—The term “levy” as used in this title includes the power of distraint and seizure by any means. Except as otherwise provided in subsection (e), a levy shall extend only to property possessed and obligations existing at the time thereof. In any case in which the Secretary may levy upon property or rights to property, he may seize and sell such property or rights to property (whether real or personal, tangible or intangible).

SECTION 6332. SURRENDER OF PROPERTY SUBJECT TO LEVY.

(a) **REQUIREMENT**—Except as otherwise provided in subsection (b), any person in possession of (or obligated with respect to) property or rights to property subject to levy upon which a levy has been made shall, upon demand of the Secretary, surrender such property or rights (or discharge such obligation) to the Secretary, except such part of the property or rights as is, at the time of such demand, subject to an attachment or execution under any judicial process.

SECTION 7422. CIVIL ACTIONS FOR REFUND.

(a) **NO SUIT PRIOR TO FILING CLAIM FOR REFUND**—No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof.

STATEMENT OF THE CASE

The facts discussed hereinbelow are contained in a stipulation of facts and agreed to by the parties.

For several years before and during the tax years involved in this case (which tax years are 1974, 1975, and 1976), Mr. Wolfe was engaged in the business of hauling commodities pursuant to authority from the Interstate Commerce Commission (ICC). His business was known as the Evergreen Express. He was also the sole shareholder and the President of Wolfe & Co., Inc. Said corporation owned tractors and trailers which it leased to Mr. Wolfe and to third parties. The corporation owned no ICC permits.

The ICC permits were always owned by Mr. Wolfe and the corporation never owned any ICC permits.

Federal tax returns regarding the taxes in issue and for prior years were filed by the corporation. Federal income tax returns for the years 1974 thru 1976 and for prior years were filed by the corporation and also by Mr. Wolfe.

The Arab oil embargo was imposed in the fall of 1973. The price of fuel oil rose drastically in 1974 and 1975 and Mr. Wolfe was unable to increase his transportation charges to keep up with the rising fuel costs.

Both the corporation and Mr. Wolfe became insolvent and all business operations were completely terminated before the end of March 1976. Since that time Mr. Wolfe has worked as a laborer and he is currently working on a crusher and doing some welding for his employer.

During the taxable years in issue, the corporation filed Federal employment tax returns, Federal highway use tax returns, and Federal diesel tax returns, with the Internal Revenue Service (IRS). It paid what taxes it could but fell behind and this case involves \$80,712.38 of said taxes which the corporation was unable to pay.

The corporation had been assessed for said \$80,712.38 of taxes by the IRS.

The IRS never made an assessment of said taxes against Mr. Wolfe.

On December 2, 1975, the IRS served a Levy on Mr. Wolfe (p. 26). On the same date, the IRS served on the ICC a Notice of Levy, naming Mr. Wolfe as the taxpayer (p. 27). On the same date, the IRS served a Notice of Seizure on the ICC, naming Mr. Wolfe as the taxpayer (p. 28).

In 1976, Mr. Wolfe was negotiating for the sale of his ICC permits to Hart Motor Express and to C.M. Burns. Prior to the completion of said sales, the IRS served them with Notices of Levy naming Mr. Wolfe as the taxpayer (p. 29, 30).

In order to clear the title to his ICC permits, it was necessary for Mr. Wolfe to pay taxes to the IRS in the sum of \$114,472.91 and said sum was paid by him on January 27, 1977. On the same day, the IRS released the Levy on all of Mr. Wolfe's ICC permits (p. 31).

Subsequently, Mr. Wolfe filed timely claims for refunds of the taxes he paid and later this suit was timely filed in the U.S. District Court for the District of Montana.

In the court of first instance, the U.S. District Court for the District of Montana, the parties agreed that federal jurisdiction was invoked because this is a federal tax refund suit arising under 26 U.S.C. 7422 (p. 7). and 28 U.S.C. 1346(a)(1) (p. 5).

ARGUMENT

1. The Ninth Circuit erred in holding that the Levy served on Mr. Wolfe was lawfully served even though Mr. Wolfe had not been assessed for the taxes in issue.

Our American system of collecting Federal taxes, including the taxes involved in this case, is known as the self-assessment system. Technically, this is not accurate. What our law provides is that certain persons have a duty to file tax returns. The actual assessment of taxes is unilaterally made by the IRS. The assessment procedure is contained in the United States Code (Code). Section 6201(a)(1) of the Code provides that the Secretary is authorized and required to make the assessments of all taxes imposed by the tax law. Such authorization shall include taxes shown on a return. The Secretary shall assess all the taxes determined by the taxpayer or by the Secretary as to which returns or lists are made under the law (p. 6).

Rights of taxpayers and rights of the government are involved in this assessment procedure including statutory collection procedures and statute of limitations which apply to various possible actions.

When a Federal tax has been assessed, the IRS has the duty to collect the tax. Code Section 6301 (p. 6).

Code Section 6303 provides that where it is not otherwise provided by the Code, the IRS shall within 60 days after making an assessment

give notice to each person liable for the unpaid tax, stating the amount and demanding payment thereof (p. 6).

Code Section 6331(a) & (b) provide that if any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand, it shall be lawful for the IRS to collect such tax by levy upon all property belonging to such person and it is provided that the term "levy" includes the power of distraint and seizure and that the property levied upon can be sold (p. 6).

Under Code Section 6332(a), a notice of levy may be served on any person in possession of property subject to levy and such person must surrender any such property to the IRS (p. 7).

In summary, before taking any statutory collection action pursuant to Section 6331, the IRS must first assess a tax liability against the taxpayer. After so doing, if the taxpayer does not pay the tax after a 10 day notice and demand, the IRS may levy upon all property belonging to the taxpayer and such property can be sold and the sales proceeds can be applied to pay the assessed tax.

Now are there any exceptions to these statutes? That is, can a Levy be served on an American citizen by identifying him as the taxpayer even though he has not been assessed for the tax for which he is alleged to owe and he has not been served with a notice and demand for payment of the tax? The statutes contain no exception to the requirement that a person upon whom a Levy is served must first be assessed for the tax and also be served with a notice and demand for payment of the tax before this statutory collection action can be used against him. These statutes are very clear in providing that a levy can only be served after the person has been assessed and no reported case, other than the Ninth Circuit in this case, has ever approved the filing of a Levy against anyone who has not been assessed and served with a notice and demand for payment of the tax. Since Mr. Wolfe was not assessed for the taxes in issue, the collection procedure used against him was illegal.

To further substantiate that the IRS's collection activity was illegal, an analysis of the documents filed and served in this case is appropriate. These documents are entitled "Levy" (p. 26), served on Mr. Wolfe, "Notice of Levy" (p. 27), served on the ICC, and "Notice of Seizure", served on the ICC (p. 28). Thereafter, a "Notice of Levy" was served on C.M. Burns (p. 29), and a "Notice of Levy" was served on Hart Motor Express (p. 30). The Levy and the notices thereof were served in order to place a cloud on the title of Mr. Wolfe's ICC permits.

The Levy provides that there is "Due from Charles E. Wolfe, dba Evergreen Express, the alter ego, agent, transferee or nominee of Wolfe & Co., Inc." In the printed portion thereof, it is stated that Section 6331 of the Code authorizes collection of the taxes by levy upon all property of the taxpayer to satisfy the unpaid balance of assessment. The form also states that the person upon whom the Levy is served has been assessed for the tax in issue and that he has been served with a notice and demand for payment. The form used in this case contains false statements because no assessment was made against Mr. Wolfe and he was not served with a notice the demand for payment.

Mr. Wolfe was the owner of certain permits issued by the ICC. As previously noted, a Notice of Levy and a Notice of Seizure were served on the ICC. The Notice of Levy states that Mr. Wolfe is the taxpayer and that his property is subject to a lien provided therefore under Chapter 64 of the Internal Revenue Code and the Notice of Seizure refers to the Levy cited above. In the Notice of Levy served on C.M. Burns and in the Notice of Levy served on Hart Motor Express, it is stated that Mr. Wolfe is the taxpayer and that his property is subject to a lien provided therefore in Chapter 64 of the Code. The notices addressed to C.M. Burns and Hart Motor Express were served on them because Mr. Wolfe was negotiating for the sale of his ICC permits to them. All of these documents contain false statements because Mr. Wolfe was never assessed for the taxes in issue nor was he ever served with a notice and demand for payment.

Because of the filing and serving of the Levy and all of the other documents discussed above, Mr. Wolfe was forced to pay \$114,472.91 claimed to be due from him by the IRS in order to clear the title to his ICC permits so that he could complete the sale of said permits to C.M. Burns and Hart Motor Express.

After Mr. Wolfe made the payment of \$114,472.91 on January 27, 1977, the IRS released the Levy on his ICC permits. The release states that Mr. Wolfe is the taxpayer (p. 31).

Thereafter, Mr. Wolfe filed the refund claims involved in this matter and later filed this action to recover the sum of \$114,472.91 paid by him.

Having decided in 1975 to proceed against Mr. Wolfe on the basis that he was the taxpayer and then filing a Levy against him, the Government is stuck with the consequences of so doing and in failing to secure

an assessment against him its collection activity was illegal and also unconstitutional.

It is well recognized that the administrative levy authorized by Congress in Section 6631 has placed an awesome power in the hands of the IRS. That is, without prior court approval, the IRS can seize and sell the property of an American citizen, and apply the proceeds to the citizen's assessed tax liability. Compare this power with what others must do in order to execute on another's property. That is, a court action will have to be won before any such action can be taken.

Now in granting this extraordinary power to the IRS, the Congress imposed 3 mandates which must be complied with before the administrative levy can be lawfully issued. These are:

First, the person upon whom the IRS serves a Levy must be clearly identified as the person who owes the taxes;

Second, the IRS must assess such person for the taxes before serving the Levy; and,

Third, the Levy cannot be served until that person has been served with a notice and demand for payment of the taxes.

In summary, Congress gave the IRS this immense power but Congress attempted to safeguard an illegal abuse of this power by imposing these 3 mandates. These mandates prevent the kind of fishing expedition which the IRS has attempted in this case.

All courts, except the Ninth Circuit in this case, have required that these 3 mandates must be complied with before such a levy is lawful. In regards to this case:

(1) Has the taxpayer been clearly identified? The answer is "yes". That is, Charles E. Wolfe is identified as the taxpayer and the Ninth Circuit's decision stated that the Levy was served on Mr. Wolfe.

(2) Was Mr. Wolfe assessed for the taxes in issue? The answer is "no". Therefore, the Levy was illegal.

(3) Was Mr. Wolfe served with a notice and demand for payment of the taxes. The answer is "no". Therefore, again, the Levy was illegal.

The Ninth Circuit's opinion states that:

"Moreover, under the alter ego theory, the assessment against the corporation was effective against Wolfe as well."

Section 6331 contains no exceptions. The alter ego doctrine is an equitable doctrine which allows a corporation's property to be used to apply against an assessed taxpayer's tax liability. It in no way oper-

ates as an exception to the requirements of Section 6331. To do so would take an Act of Congress.

It is clear that under the Code the collection activity of the IRS in this case was illegal because Mr. Wolfe was not assessed for the taxes and it was mandatory to make such an assessment and also to serve him with a notice and demand for payment of the tax before a Levy could lawfully be served against him. The illegal seizure of Mr. Wolfe's ICC permits also constituted a violation of the 4th Amendment of the U.S. Constitution which prohibits unreasonable seizures and the illegal filing and serving of the Levy against him and filing a Notice of Levy on the ICC and on Mr. Burns and on Hart Motor Express constitute a violation of the 5th Amendment of the U.S. Constitution which prohibits the taking of property without due process of law. Therefore, the collection from Mr. Wolfe of \$114,472.91 constituted an "erroneous and illegal" collection pursuant to 28 U.S.C. Section 1346(a)(1).

The parties stipulated that if the court holds that the \$114,472.91 is refundable because no assessment was made against Mr. Wolfe, then he is entitled to judgment against the Government in that amount. It is submitted that such a judgment should be so ordered because it is clear that an assessment was required by law before a Levy and notices thereof could lawfully be served and filed against Mr. Wolfe.

The first question presented for review hereinabove is: Does the judicial branch of the U.S. Government have the legal authority to amend the laws of the U.S. Congress? Probably everyone would answer "of course not" since to do so would violate the separation of powers provisions of the U.S. Constitution. But what has the Ninth Circuit done in this case? The effect of its decision is to amend Section 6331 in the following manner:

"a Levy can be served on an American citizen by alleging that he is an alter ego of a corporation and by so doing it is not necessary to assess him for the taxes in issue nor is it necessary to serve him with a notice and demand for payment of the taxes."

It is submitted that the Ninth Circuit exceeded its judicial authority by adopting this legislative exception to Section 6331 and by so doing it has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

2. The Ninth Circuit erred in holding that a Levy and a Notice of Levy are not distinct and in so doing it has overruled a decision of the U.S. Supreme Court.

In its holding, the Court stated (p. 23):

“Wolfe misconstrues section 6331 by arguing that a notice of levy and a levy are distinct, and that a notice of levy, but not a levy, can be served on persons against whom assessments have not been made.”

It is submitted that the Ninth Circuit is in error in not distinguishing between a Levy and a Notice of Levy and its failure to make this distinction is clearly erroneous and has the effect of overruling the United States Supreme Court. In a 1985 decision, the U.S. Supreme Court decided a case in which the levy statutes were discussed in concise and clear language. The case is *U.S. v. National Bank of Commerce*, 86 L Ed 565 (1985). The Court, at page 569, stated that Internal Revenue Code Section 6331(a) provides that the Government may collect taxes of a delinquent taxpayer “by levy upon all property and rights to property . . . belonging to such person.” The Court then cited Code Section 6332(a) and stated that “any person in possession of . . . property or rights to property subject to levy upon which a levy has been made, shall upon demand of the Secretary, surrender such property or rights . . . to the Secretary.” In the *National Bank of Commerce* case, a Notice of Levy had been served on the respondent bank. The Supreme Court stated, at page 574, “in a situation where a taxpayer’s property is held by another, a notice of levy upon the custodian is customarily served pursuant to Code Section 6332(a). This notice gives the IRS the right to all property levied upon . . . and creates a custodial relationship between the person holding the property and the IRS so that the property comes into the constructive possession of the Government.” Although the Court’s opinion was not unanimous regarding the merits of the case, it is believed that all of the justices agreed with the procedural matters quoted above.

This Supreme Court case clearly illustrates the illegal collection procedure used by the IRS in this case. The IRS proceeded against Mr. Wolfe by filing a Levy against him. This Levy document can only be filed against a delinquent taxpayer and as the Supreme Court stated, this document involves Code Section 6331(a). Before Section 6331(a) becomes effective, it is mandatory that the taxpayer must first be assessed for the tax in issue pursuant to Section 6201(a)(1).

When Code Section 6332(a) is applicable, it is not necessary to make an assessment against such a third person. Only a notice of the levy

against the taxpayer need be served on the third party. The reason why no assessment is necessary is that the IRS is not claiming that the third person owes any tax. The notice of levy under Section 6332(a) simply brings the taxpayer's property in the possession of the third person into the constructive possession of the IRS.

In this case, Mr. Wolfe always owned the ICC permits and his corporation, Wolfe & Co., Inc., never owned any ICC permits.

The second question presented for hereinabove is: Does a U.S. appeals court have legal authority to overrule a decision of this Court? Probably everyone would say "of course not" but in this case the Ninth Circuit has, in effect, done so. Why did the Ninth Circuit choose to ignore the clear language of this Supreme Court case? It didn't give any reason.

It is clear that this is a proper case for this Court to grant certiorari because the Ninth Circuit's opinion is in direct conflict with this Court's decision in the *National Bank of Commerce* case.

3. The Ninth Circuit erred in holding that Mr. Wolfe was the alter ego of his solely owned corporation and that he had to pay the taxes owed by his corporation.

In this case, the IRS officials drafted the Levy and the notices thereof in reverse of the standard manner of challenging the separate legal status of a corporation and its shareholders. That is, in a standard case, it is the corporation which is alleged to be the alter ego if its shareholders. The term "alter ego" is defined as "a second self". Since a corporation is by law a fictional person, courts have held that when the operations of a corporation have not legally measured up to the standards required of a separate entity, the corporate veil can be pierced and certain liabilities of the corporation can be imposed upon the shareholders. That is, the corporation is then classified as the "second self" of the shareholders.

However, in this case, the IRS alleged in the Levy and notices thereof that Mr. Wolfe was the alter ego of a corporation. This is the reverse of the standard doctrine. No reported tax case has been found in which this has been attempted by the IRS. It is submitted that it is impossible to "pierce the veil of a human being" in order to classify him as a corporation's "second self" so as to require that his property be used to pay a Federal tax liability of a corporation.

No other tax case has been found wherein a court has held that an American citizen who was a shareholder of a corporation was liable

to have his property used to pay Federal corporate taxes on the grounds that he was the alter ego of the corporation. It is submitted that to do so would take an Act of Congress.

It is submitted that an allegation that an American citizen is the alter ego of his solely owned corporation does not make common sense. This is because such an allegation implies that the corporation is valid for all purposes and that it is possible to "pierce the veil of a human being". This is simply not possible either physically or legally. Stated another way, an individual shareholder of a corporation might so dominate a corporation by his actions that a court could hold that the corporation was his "second self", that is, his alter ego. But how could a fictional person, that is, a corporation, so dominate its individual shareholder so as to require that the shareholder be classified as the "second self" of the corporation? Such a result would be irrational.

Not in 200 years of Federal taxation prior to this decision by the Ninth Circuit has any court rendered such a wierd holding. The alter ego doctrine should never be applied backwards and the reasons why no court should ever adopt such a backwards version of the alter ego doctrine in tax cases are as follows:

(1) It is unreasonable and inconsistent for the IRS to attempt to use it, since the IRS has accepted the corporate tax returns as filed and has assessed the taxes against the corporation. Therefore, the IRS should logically and reasonably have to take the position that the corporation is a completely valid corporation.

(2) Even if the corporate veil were pierced, the only legal effect would be to disregard the corporation for the entire transaction including the filing of corporate tax returns and the assessment of the tax against the corporation.

(3) A corporation does not own any interest in the property of its individual shareholders—hence there is no equitable principle which would require that the individual's property be used to pay the corporation's tax liability.

(4) To attempt to pierce the veil of a human being and then claim that he is the alter ego of a corporation is impossible.

(5) It would take an Act of Congress to impose such a law and Congress has never contemplated such an irrational law.

CONCLUSION

Are we a nation of laws? The answer is "yes". Then what should be the result if the IRS abuses the laws passed by the U.S. Congress? First, the IRS itself should correct its own mistakes and if it doesn't then as American citizens we must rely on the Federal judiciary to correct such mistakes. In this case, the Ninth Circuit has failed to secure procedural justice for an American citizen and instead has rendered an erroneous and regressive decision upholding the illegal and unconstitutional collection actions of the IRS. In the name of the civil rights of American taxpayers, it is requested that the Court grant certiorari and thereafter reverse the decision of the Ninth Circuit.

Respectfully submitted, ,

March 11, 1987

s/ Jack W. Burnett

Jack W. Burnett

APPENDIX

*For Publication*UNITED STATES COURTS OF APPEALS
FOR THE NINTH CIRCUIT

Filed August 29, 1986

Cathy A. Catterson, Clerk
U.S. Courts of Appeals

CHARLES E. WOLFE,)	
	)	No. 85-4027
<i>Plaintiff-Appellant,</i>	)	DC No. Cv 82-227-BLG
	)	OPINION
vs.)	
)	
UNITED STATES OF AMERICA,)	
)	
<i>Defendant-Appellee.</i>)	
)	

Appeal from the United States District Court
for the District of Montana
Honorable James F. Battin, Chief Judge, Presiding

Argued June 12, 1986—
San Francisco, CA
Submitted July 9, 1986

Before: CHAMBERS and CHOY, Senior Circuit Judges, and
NORRIS, Circuit Judge.

CHOY, Senior Circuit Judge:

Charles E. Wolfe appeals the district court grant of summary judgment, requiring Wolfe, as the alter ego of his corporation (Wolfe & Company), to pay taxes assessed against the corporation. The court additionally held that procedures employed by the Government to levy Wolfe's property were in compliance with federal tax statutes and regulations. We affirm.

I

BACKGROUND

Wolfe was the sole shareholder and president of Wolfe & Company, ("corporation"), which leased tractor-trailers. Wolfe also operated a proprietorship known as Charles E. Wolfe d/b/a Evergreen Express ("proprietorship"), an "over-the-road" trucking business.

During the tax years 1974-1976, the corporation incurred \$114,472.91 in federal tax liabilities for employment, fuel, and highway use taxes, and for penalties, fees, and interest. The Government assessed this amount against the corporation, which the corporation failed to pay after notice and demand. The Government then levied on Wolfe's Interstate Commerce Commission permits used in his trucking business by issuing a levy against Wolfe and serving notices of levy upon the Interstate Commerce Commission and a prospective buyer of the permits. Wolfe paid the taxes and sued for a refund in district court, alleging that the levy was invalid since he had not been personally assessed with the corporation's tax liabilities.

The parties stipulated to all of the facts and exhibits in the case, among them, the absence of separate bank accounts and Wolfe's payment of corporate employee salaries with proprietorship checks, while charging wages and employee taxes to the corporation. The parties also agreed in the pretrial order that no witnesses were necessary for resolution of the dispute.

The Government subsequently moved to file Wolfe's deposition. Wolfe did not oppose the motion, and the court allowed the deposition to be filed. The district court granted summary judgment against Wolfe, and Wolfe timely appeals.

II

APPLICABILITY OF ALTER EGO DOCTRINE

Wolfe challenges the application of the alter ego doctrine to require an individual shareholder to pay the taxes of a disregarded corporated entity. He argues that the Government cannot, on the one hand, consider a corporation viable for the purpose of assessing corporate taxes,

and, on the other hand, disregard the same corporation to reach the assets of an individual shareholder.¹

It is clear that creditors of a corporation may satisfy liabilities from a shareholder's assets under the alter ego doctrine. See *Laborers Clean-Up Contract Administration Trust Fund v. Uriarte Clean-Up Services, Inc.*, 736 F.2d 516, 524 (9th Cir. 1984) (explicating the test for determining whether stockholders are personally liable for the debts of their corporations). However, the question remains whether this debtor/creditor alter ego theory applies in the tax context, i.e. allowing the Government/creditor to satisfy the corporation's tax liability from assets of the shareholder. This circuit has not yet considered this issue.

In *Avco Delta Corp. Canada Ltd. v. United States*, 540 F.2d 258, 264-65 (7th Cir. 1976), *cert. denied*, 429 U.S. 1040 (1977), the Seventh Circuit used the alter ego doctrine to require a corporation to pay the taxes of its wholly-owned corporate subsidiary. Wolfe argues that *Avco Delta* did not require an *individual* shareholder to pay the taxes of the disregarded corporation. However, this does not appear to be a material distinction. The essential point to be derived from *Avco Delta* is that a subsidiary corporation can be recognized as a corporation for the purpose of determining the tax, but then disregarded for the purpose of obtaining payment of that amount.

Indeed, despite Wolfe's contentions, it is not necessarily inconsistent to view a corporation as viable for the purpose of assessing a corporation tax, while disregarding it for the purpose of satisfying that assessment. Only those corporations that were established with no valid purpose are considered sham corporations, and thus not entitled to separate taxable status. See *Moline Properties v. Commissioner of Internal Revenue*, 319 U.S. 436, 439 (1943). A corporation could have a valid business purpose (giving it separate tax status), and at the same time be so dominated by its owner that it could be disregarded under the alter ego doctrine. Cf. *National Carbide Corp. v. Commissioner of Internal Revenue*, 336 U.S. 422, 431-434 & n. 13 (1949) (finding insignificant, for the purpose of determining whether a subsidiary corporation is entitled to separate taxable status, the fact that the owner retains direction of the subsidiary's affairs, provides all of its assets,

¹Whether the alter ego doctrine may be applied to require an individual to pay the tax owed by his corporation is a question of law which we review *de novo*. *United States v. McConney*, 728 F.2d 1195, 1201 (9th Cir.), *cert. denied*, 105 S. Ct. 101 (1984).

taxes all its profits, and exercises complete domination and control over its business). This view has been adopted by the Fifth Circuit. See *Harris v. United States*, 764 F.2d 1126, 1128 (5th Cir. 1985) ("[w]hether or not [the corporation] was a separate taxable entity is not the same question as whether it was an alter ego for the purpose of piercing the corporate veil"); see also *United States v. Creel*, 711 F.2d 575, 579 (5th Cir. 1983), *cert. denied*, 464 U.S. 1044 (1984). Indeed, in *Harris*, an individual shareholder's property was held subject to a tax lien to satisfy the disregarded corporation's unpaid employment taxes. 764 F.2d at 1129.

We conclude that the alter ego doctrine can be employed to require Wolfe to pay the taxes of his corporation. There has been no assertion that the corporation had no valid business purpose. The Government stands in a position analogous to any creditor seeking to collect debts owed by the corporation.

III

WHETHER WOLFE WAS AN ALTER EGO

The question remains whether the district court erred by holding that Wolfe was in fact the alter ego of his corporation.² Wolfe raises only two issues regarding the district court's factual conclusion. First, he contends that the district court failed to find wrongful or fraudulent conduct by the taxpayer, which he argues is required under the alter

²Because the question whether Wolfe was the alter ego of his corporation is essentially factual, it is generally reviewed under the clearly erroneous standard. *United States v. McConney*, 728 F.2d 1195, 1201, (1984), *cert. denied*, 105 S.Ct. 101 (1985). For purposes of their cross-motions for summary judgment in this case, the parties stipulated to "all pertinent facts and exhibits necessary for the resolution of the issues." It is clear that in doing so, the parties intended to submit the case for a bench trial on stipulated facts. See *Starsky v. Williams*, 512 F.2d 109, 111 (9th Cir. 1975). Thus, even though the case is before us on appeal from an award of summary judgment, the district court's determination that Wolfe was the alter ego of his corporation is reviewed under the clearly erroneous standard. See *id.*

ego doctrine. However, under Montana law,³ a corporate entity may be pierced without a positive showing of fraud. See *E.C.A. Environmental Management v. Toenyes*, ___ Mont. ___, 679 P.2d 213, 219 (1984). Indeed, a corporation will be disregarded where it is used to evade a public duty, such as the paying of taxes. *Commerical Credit Co. v. O'Brien*, 115 Mont. 199, 211, 146 P.2d 637, 643 (1944), *cert. denied*, 323 U.S. 665 (1944); *accord Valley Finance, Inc. v. United States*, 629 F.2d 162, 171-72 (D.C. Cir. 1980) ("[t]he Government's inability otherwise to satisfy legitimate federal tax debts clearly may form a sound basis for such disregard of corporate form"), *cert. denied*, 451 U.S. 1018 (1981).

Second, Wolfe argues that the district court improperly relied on statements he made in a deposition.⁴ Wolfe contends that no information should have been considered by the district court other than that contained in the stipulation between Wolfe and the Government, and that the deposition was never properly admitted into evidence.

We need not determine the merits of Wolfe's contentions. Even if use of the deposition was improper, we would nevertheless affirm the district court judgment in light of the overwhelming evidence supporting the application of the alter ego doctrine apart from statements made in the deposition. See *Purer & Co. v. Aktiebolaget Addo*, 410 F.2d 871, 876 (9th Cir.), *cert. denied*, 396 U.S. 834 (1969); *accord Lovett v. Shuster*, 633 F.2d 98, 103 (8th Cir. 1980); see also Fed. R. Civ. Pro. 61. As the district court noted, Wolfe was the sole share-

³The parties do not dispute the district court's application of Montana's alter ego doctrine. In determining whether there exists an alter ego from whom the Government may satisfy the obligation of a taxpayer, we appear to be bound by state law. See *Aquilino v. United States*, 363 U.S. 509, 512-13 (1960); *Terrapin Leasing, Ltd. v. United States*, 55 Amer. Fed. Tax Rpts. 2d 85-513, 85-514 (10th Cir. 1981); see also *Van Dorn Co. v. Future Chemical and Oil Corp.*, 753 F.2d 565, 570-71 (7th Cir. 1985) (criticizing *Avco Delta* for failing to inquire into applicable state law in determining that the assets of the principal corporation could be reached to satisfy tax liability of the subsidiary corporation).

⁴The district court states in its memorandum: "Mr. Wolfe admitted in his deposition that '[a]ll the thing [corporation] amounted to was actually a screen.' . . . Mr. Wolfe admitted in his deposition that 'I don't really see how a person could go down through this thing and technically separate the two [the corporation and the proprietorship]'. When asked if he considered the corporation and the proprietorship to be the same thing, he responded: 'Yes.'" Memorandum Opinion, at 4 (May 22, 1985).

holder of the corporation. He was a director and president of the corporation, and made all corporate decisions without consulting other directors. The corporation had no bank account. Banking transactions were conducted through the proprietorship's bank account. The corporation's employee was paid by the proprietorship. Some of the corporation's equipment was purchased on the proprietorship's credit. All of the corporation's purchases were paid for on a proprietorship bank account. When the corporation received payment from third parties, the money was deposited into the proprietorship's bank account. These facts have been stipulated to by Wolfe, and are overwhelmingly sufficient to support the finding by the district court that Wolfe was the alter ego of his corporation.

IV

NOTICE OF LEVY

Wolfe challenges the levy served upon him as illegal because no assessment was made against him as a taxpayer. He argues that levies to collect taxes can be served only upon taxpayers against whom assessments have been made. This argument is without merit.

Section 6331 of the Internal Revenue Code empowers the Government to collect overdue taxes by levying upon the taxpayer's property. The regulations to this section provide that a *levy* can be served upon *any person* in possession of property subject to levy, by serving a *notice of levy*. 26 C.F.R. §§ 301.6331-1 (a) (1) (1985). Thus, levies can be effected against any person in possession of the taxpayer's property, not just against the taxpayer.

Wolfe misconstrues section 6331 by arguing that a notice of levy and a levy are distinct, and that a notice of levy, but not a levy, can be served on persons against whom assessments have not been made. Regulation 301.6331-1 makes clear that a notice of levy is simply a means of effecting a levy against persons in possession of taxpayer property.

Moreover, under alter ego theory, the assessment against the corporation was effective against Wolfe as well. *See Harris v. United States*, 764 F.2d at 1129 (under alter ego theory, assessment issued against corporation was effective as against both shareholder and cor-

poration); *see also Valley Finance, Inc. v. United States*, 629 F.2d at 169 (alter ego of corporation not entitled to separate notice of deficiency).⁵

Wolfe also argues that his interest in the ICC licenses was not taxpayer property subject to levy. However, property subject to levy within the meaning of section 6331 and the applicable regulations is construed broadly and reflects congressional intent that the Government be able to reach every interest in property a taxpayer might have. *United States v. National Bank of Commerce*, 105 S.Ct. 2919, 2924 (1985). The ICC licenses ostensibly owned by Wolfe could therefore be levied upon by the Government as property of the taxpayer corporation, through application of the alter ego theory.

The district court judgment is AFFIRMED.

For Publication

UNITED STATES COURTS OF APPEALS
FOR THE NINTH CIRCUIT
Filed December 29, 1986

CHARLES E. WOLFE,	)	Cathy A. Catterson, Clerk
	)	U.S. Courts of Appeals
<i>Plaintiff-Appellant,</i>	)	No. 85-4027
vs.	)	DC No. Cv 82-227-BLG
)	
	)	ORDER AMENDING OPINION,
	)	DENYING PETITION FOR
UNITED STATES OF AMERICA,	)	REHEARING AND REJECTING
	)	SUGGESTION FOR
<i>Defendant-Appellee.</i>	)	REHEARING EN BANC
)	

⁵Wolfe's reliance on *United States v. Coson*, 286 F.2d 453 (9th Cir. 1961), in support of his argument that the Government's failure to file an assessment against him invalidated the levy is misplaced. *Coson* involved partnership tax liability, and since partners and partnerships, unlike corporations and shareholders, are not separate taxable entities, the case is distinguishable on that ground. The *Coson* court invalidated a levy against a partner because no assessments, notice or demand had been filed against him as a taxpayer. Here, on the other hand, the Government issued the required assessment, notice, and demand against the taxpayer corporation. *Coson* does not mandate that assessments be made against third parties in possession of taxpayer property before levies can be effected.

Before: CHAMBERS and CHOY, Senior Circuit Judges, and
NORRIS, Circuit Judge.

The Opinion filed on August 29, 1986, is amended as follows:

Footnote three, 798 F.2d 1241, 1244 n.3, is replaced by the following:

The parties do not dispute the district court's application of Montana's alter ego doctrine. The determination of whether to apply state or federal alter ego doctrine depends on the degree to which the subject matter of the case implicates federal interests. *See United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 728-29 (1979) (setting forth three-part test to determine whether courts should adopt a uniform federal rule of decision or follow state law when resolving controversies affecting the operation of federal programs). *Compare Laborers Clean-Up Contract Administration Trust Fund v. Uriarte Clean-Up Service, Inc.*, 736 F.2d 516, 523-25 (9th Cir. 1984) (applying federal substantive law—through looking to state law for guidance—in determining whether to pierce corporate veil in case involving violations of Labor Management Relations Act and Employee Retirement Income Security Act) *with U-Haul International, Inc. v. Jartran, Inc.*, 793 F.2d 1034, 1043 (9th Cir. 1986) (applying state alter ego doctrine in assessment of damages for Lanham Act violations). State law governs the determination of whether there exists an alter ego from whom the government may satisfy the obligation of a taxpayer. *See Aquilino v. United States*, 363 U.S. 509, 512-13 (1960); *Terrapin Leasing, Ltd. v. United States*, 55 Am. Fed. Tax Rep. 2d 85-513, 85-514 (10th Cir. 1981); *see also Van Dorn Co. v. Future Chemical and Oil Corp.*, 753 F.2d 565, 570-71 (7th Cir. 1985) (indicating disapproval of *Avco Delta* for failing to inquire into applicable state law in determining that assets of the subsidiary corporation).

The following passages are deleted from the text of the opinion:

798 F.2d at 1244, col. 2, delete: “, and made all corporate decisions without consulting other directors”

798 F.2d at 1244, col. 2, delete: “Some of the corporation's equipment was purchased on the proprietorship's credit.”

The full court has been advised of appellant's petition for rehearing and suggestion for rehearing en banc and the amendments to the Opinion. No judge of the court has objected to the amendments or requested a vote on the suggestion for rehearing en banc.

Fed. R. App. P. 35(b).

With the Opinion so amended the petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

LEVY

DEPARTMENT OF TREASURY INTERNAL REVENUE SERVICE

Due from: Charles E. Wolfe, dba Evergreen Express, the alter ego, agent, transferee or nominee of:

Wolfe & Co., Inc. P.O. Box 212, Billings, MT 59103

Originating Internal Revenue District (City and State): Helena, Montana

KIND OF TAX	TAX PERIOD ENDED	DATE OF ASSESSMENT	IDENTIFYING NO.	UNPAID BALANCE OF ASSESSMENT	STATUTORY ADDITIONS	TOTAL
941	6-30-74	11- 4-74	81-0290829	\$27,686.55	\$1,630.26	\$
					2,260.09	31,572.90
941	9-30-74	12-30-74	"	26,095.76	1,375.65	
					1,843.71	29,315.12
941	12-31-74	3-24-75	"	1,273.35	72.66	1,346.01
941	3-31-75	6-23-75	"	4,020.55	118.37	
					168.78	4,307.70
720	9-30-74	2-24-75	"	3,678.40	154.46	
					224.42	4,057.28
720	12-31-74	6- 2-75	"	3,905.26	104.15	
					175.97	4,185.38
720	6-30-75	10-27-75	"	3,778.82	33.97	
					44.17	3,856.96
TOTAL AMOUNT DUE						\$78,641.35

There is now due, owing, and unpaid with respect to the above-named account, the amounts set forth herein for internal revenue taxes for which notice and demand has been made for payment. Section 6331, Internal Revenue Code, authorizes collection of taxes by levy upon all property or rights to property of a taxpayer (except property that is exempt under section 6334) or on which the lien provided by section 6321 exists. Therefore, under the provisions of section 6331, so much of the property or rights to property, either real or personal, as may be necessary to satisfy the unpaid balance of assessment set forth herein together with additions provided by law, including fees, costs, and expenses of this levy, are hereby levied upon in order to satisfy the taxes and additions.

_____ was presented inventory. ☐ Yes ☒ No
(T/P or T/P's representative's name)

Dated at Billings, MT this 2nd day of December, 1975

Signed: D.L. Leifert, Revenue Officer

SPS SEIZURE FILE

NOTICE OF LEVY

Date: November 26, 1975

TO: Interstate Commerce Commission
 Room 222
 Post Office Building
 2602 First Avenue North
 Billings, MT 59101

INTERNAL REVENUE SERVICE

Originating District: Helena, Montana

You are hereby notified that there is now due, owing, and unpaid to the United States of America, from the taxpayer whose name appears below, the sum of **\$78,641.35**

KIND OF TAX	TAX PERIOD ENDED	DATE OF ASSESSMENT	IDENTIFYING NO.	UNPAID BALANCE OF ASSESSMENT	STATUTORY ADDITIONS	TOTAL
941	6-30-74	11- 4-74	81-0290829	\$27,686.55	\$3,890.35	\$31,572.90
941	9-30-74	12-30-74	"	26,095.76	3,219.36	29,315.12
941	12-31-74	3-24-75	"	1,273.35	72.66	1,346.01
720	9-30-74	2-24-75	"	3,678.40	378.88	4,057.28
720	12-31-74	6- 2-75	"	3,905.26	280.12	4,185.38
720	6-30-75	10-27-75	"	3,778.82	78.14	3,856.96
941	3-31-75	6-23-75	"	4,020.55	287.15	4,307.70
TOTAL AMOUNT DUE						\$78,641.35

You are further notified that demand has been made for the amount set forth herein upon the taxpayer who has neglected or refused to pay, and that such amount is still due, owing, and unpaid from this taxpayer. Accordingly, you are further notified that all property, rights to property, moneys, credits, and bank deposits *now in your possession* and belonging to this taxpayer (or with respect to which you are obligated) and all sums of money or other obligations owing from you to this taxpayer, or on which there is a lien provided under Chapter 64, Internal Revenue Code, are hereby levied upon and seized for satisfaction of the aforesaid tax, together with all additions provided by law, and demand is hereby made upon you for the amount necessary to satisfy the liability set forth herein, or for such lesser sum as you may be indebted to him to be applied as a payment on his tax liability. Checks or money orders should be made payable to the Internal Revenue Service.

Signed: D.L. Leifert, Revenue Officer, Billings, Montana

Phone: 245-6711, ext. 6255

Name and Address of Taxpayer:

Charles E. Wolfe, dba Evergreen Express,
 the alter ego, agent, transferee or nominee of
 Wolfe & Co., Inc.
 P.O. Box 212
 Billings, MT 59103

CERTIFICATE OF SERVICE

I hereby certify that this notice of levy was served by delivering a copy of it to the person name below.

Name: Paul Labane

Title: Department Supervisor

Date and Time: 12-2-75 — 10:30 a.m.

Signature of Revenue Officer or Service Representative: D.L. Leifert

NOTICE OF SEIZURE

DEPARTMENT OF THE TREASURY INTERNAL REVENUE SERVICE

Name and Address:

Interstate Commerce Commission
Room 222
Post Office Building
2602 1st Ave. No.
Billings, MT 59101

Pursuant to the authority in section 6331 of the Internal Revenue Code and by virtue of a levy placed in my hands for execution by the District Director of Internal Revenue of the district shown below, I have seized the following described property for nonpayment of delinquent internal revenue taxes:

Due from: Charles E. Wolfe, dba Evergreen Express, the alter ego, agent, transferee or nominee of:

Wolfe & Co. Inc., P.O. Box 212, Billings, MT 59103.

In the amount of: \$78,641.35

Internal Revenue District (City & State):

Helena, MT

Description of Property

Interstate Commerce Commission Certificate of Public Convenience & Necessity, Number						
						MC129350 Sub 1
						Sub 4
						5
						6
						11
						17
						19
						23
						26
						28
						36
						38
						50

Total of Thirteen Certificates

Signature of Revenue Officer:

D.L. Leifert

Address: 711 Central Ave., Billings, MT

Date: 12-2-75

NOTICE OF LEVY

Date: August 19, 1976

To: C.M. Burns
dba Western Trucking
Baker, Montana

INTERNAL REVENUE SERVICE

Originating District: Helena, Montana

You are hereby notified that there is now due, owing, and unpaid to the United States of America, from the taxpayer whose name appears below, the sum of **\$117,151.81**

KIND OF TAX	TAX PERIOD ENDED	DATE OF ASSESSMENT	IDENTIFYING NO.	UNPAID BALANCE OF ASSESSMENT	STATUTORY ADDITIONS	TOTAL
941	6-30-74	11- 4-74	81-0290829	\$27,686.55	\$6,410.66	\$34,093.21
941	9-30-74	12-30-74	"	26,095.76	5,610.71	31,706.47
941	12-31-74	3-24-75	"	471.50	101.74	573.24
941	3-31-75	6-23-75	"	4,020.55	674.23	4,694.78
941	12-31-74	6- 2-75	"	462.60	18.07	480.67
941	9-30-75	12- 8-75	"	26,929.65	2,580.28	29,509.93
941	12-31-75	3-29-75	"	672.10	19.95	692.05
720	9-30-74	2-24-75	"	3,670.40	707.64	4,378.04
720	12-31-74	6- 2-75	"	3,905.26	637.95	4,543.21
720	6-30-75	10-27-75	"	3,778.82	425.47	4,204.29
720	9-30-75	2-16-76	"	1,780.72	125.41	1,906.13
2290	6-30-75	9- 8-75	"	360.12	9.67	369.79
TOTAL AMOUNT DUE						\$117,511.81

You are further notified that demand has been made for the amount set forth herein upon the taxpayer who has neglected or refused to pay, and that such amount is still due, owing, and unpaid from this taxpayer. Accordingly, you are further notified that all property, rights to property, moneys, credits, and bank deposits *now in your possession* and belonging to this taxpayer (or with respect to which you are obligated) and all sums of money or other obligations owing from you to this taxpayer, or on which there is a lien provided under Chapter 64, Internal Revenue Code, are hereby levied upon and seized for satisfaction of the aforesaid tax, together with all additions provided by law, and demand is hereby made upon you for the amount necessary to satisfy the liability set forth herein, or for such lesser sum as you may be indebted to him to be applied as a payment on his tax liability. Checks or money orders should be made payable to the Internal Revenue Service.

Signed: D.L. Leifert, Revenue Officer, Billings, Montana

Phone: 245-6711, ext. 6265

Name and Address of Taxpayer:

Charles E. Wolfe, dba Evergreen Express,
the alter ego, agent, transferee or nominee of
Wolfe & Co., Inc.
P.O. Box 212
Billings, MT 59103

CERTIFICATE OF SERVICE

I hereby certify that this notice of levy was served by delivering a copy of it to the person named below.

Name: John R. Davidson

Title: Attorney for C.M. Burns

Date and Time: 9-1-76 — 2:45 p.m.

Signature of Revenue Officer or Service Representative:

D.L. Leifert

NOTICE OF LEVY

Date: December 29, 1976

To: Hart Motor Express

c/o John Davidson

Midland Bank Building

Billings, Montana

INTERNAL REVENUE SERVICE

Originating District: Helena, Montana

You are hereby notified that there is now due, owing, and unpaid to the United States of America, from the taxpayer whose name appears below, the sum of **\$114,968.02**

KIND OF TAX	TAX PERIOD ENDED	DATE OF ASSESSMENT	IDENTIFYING NO.	UNPAID BALANCE OF ASSESSMENT	STATUTORY ADDITIONS	TOTAL
941	6-30-74	11- 4-74	81-0290829	\$20,557.55	\$7,405.31	\$27,962.86
941	9-30-74	12-30-74	"	26,099.76	6,720.26	32,820.02
941	12-31-74	3-24-75	"	471.50	113.56	585.06
941	3-31-75	6-23-75	"	4,020.55	853.01	4,873.56
941	6-30-75	9-15-75	"	462.60	29.61	492.21
941	9-30-75	12- 8-75	"	26,938.65	3,756.18	30,693.83
941	12-31-75	3-29-75	"	672.10	36.72	708.82
720	9-30-74	2-24-75	"	3,670.40	850.85	4,530.25
720	12-31-74	6- 2-75	"	3,905.26	803.48	4,708.74
720	6-30-75	10-27-75	"	3,778.82	686.28	4,365.10
720	9-30-75	2-16-76	"	1,780.72	202.86	1,983.58
2290	6-30-75	9- 8-75	"	360.12	18.78	378.90
2290	6-30-76	9- 8-75	"	820.42	44.67	865.09
TOTAL AMOUNT DUE						\$114,968.02

You are further notified that demand has been made for the amount set forth herein upon the taxpayer who has neglected or refused to pay, and that such amount is still due, owing, and unpaid from this taxpayer. Accordingly, you are further notified that all property, rights to property, moneys, credits, and bank deposits *now in your possession* and belonging to this taxpayer (or with respect to which you are obligated) and all sums of money or other obligations owing from you to this taxpayer, or on which there is a lien provided under Chapter 64, Internal Revenue Code, are hereby levied upon and seized for satisfaction of the aforesaid tax, together with all additions provided by law, and demand is hereby made upon you for the amount necessary to satisfy the liability set forth herein, or for such lesser sum as you may be indebted to him to be applied as a payment on his tax liability. Checks or money orders should be made payable to the Internal Revenue Service.

Signed: D.L. Leifert, Revenue Officer, Billings, Montana

Phone: 245-6711, ext. 6265

Name and Address of Taxpayer:

Charles E. Wolfe, dba Evergreen Express,

the alter ego, agent, transferee or nominee of
 Wolfe & Co., Inc.
 P.O. Box 212
 Billings, MT 59103

CERTIFICATE OF SERVICE

I hereby certify that this notice of levy was served by delivering a copy of it to the person named below.

Name: John R. Davidson

Title: Attorney for Hart Motor Express

Date and Time: 12-29-76 — 11:20 a.m.

Signature of Revenue Officer or Service Representative:

D.L. Leifert

RELEASE OF LEVY

Account of: Charles E. Wolfe, dba Evergreen Express, the alter ego, agent, transferee or nominee of:

Wolfe & Co. Inc., P.O. Box 212, Billings, MT 59103.

On the 2nd day of December, 1975, certain property or rights to property belonging to the above-named taxpayer were levied upon pursuant to levy dated December 2, 1975.

Under the provisions of section 6343 of the Internal Revenue Code, the following property or rights to property are hereby released from the levy upon execution by the recipient of the official receipt provided on the reverse:

Interstate Commerce Commission Certificate of Public Convenience & Necessity, Number						MC129350	Sub	1
"	"	"	"	"	"	"	Sub	4
"	"	"	"	"	"	"	5A &	5
"	"	"	"	"	"	"		6
"	"	"	"	"	"	"		11
"	"	"	"	"	"	"		17
"	"	"	"	"	"	"		19
"	"	"	"	"	"	"		23
"	"	"	"	"	"	"		26
"	"	"	"	"	"	"		28
"	"	"	"	"	"	"		36
"	"	"	"	"	"	"		38
"	"	"	"	"	"	"		50

Total of Thirteen Certificates

Dated at Billings, Montana this 27th day of January, 1977.

Signed: D.L. Leifert, Revenue Officer

APR 13 1987

JOSEPH F. SPANIOL, JR.
CLERK

(2)
No. 86-1576

IN THE

OCTOBER TERM, 1986

CHARLES E. WOLFE,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent.

SUPPLEMENTAL APPENDIX

Attorney for Petitioner:

Jack W. Burnett
Attorney at Law
Suite 206
1300 Avenue C
Billings, MT 59102

(406) 252-4910



IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

CHARLES E. WOLFE,)	
	)	CV 82-227-BLG
Plaintiff,)	
-vs-)	
)	
UNITED STATES OF AMERICA,	)	MEMORANDUM OPINION
)	
Defendant.)	
)	

This case is before the Court on cross-motions for summary judgment. For the reasons stated below, the defendant's motion is granted and the plaintiff's motion is denied.

FACTS AND PROCEDURE

The facts of this case are not in dispute. The parties have filed an extensive stipulation of facts with the Court.

Charles E. Wolfe was the sole shareholder and president of Wolfe & Company (corporation), a corporation which leased tractor-trailers. Charles E. Wolfe also operated a business as a proprietorship known as Charles E. Wolfe dba Evergreen Express (proprietorship) which was an "over-the-road" trucking business.

In tax years 1974, 1975, and 1976, the corporation incurred a \$114,472.91 federal tax bill for federal employment taxes, diesel fuel taxes, highway use taxes, and penalties, fees, and interest. Charles E. Wolfe paid the taxes of the corporation after the Internal Revenue Service (Service) levied on Mr. Wolfe's Interstate Commerce Commission permits used in his trucking business. Mr. Wolfe contends that since he was never personally assessed with the tax liabilities of the corporation, the Service cannot look to his personal property for payment of the taxes due. The Service contends that it may properly look to Mr. Wolfe's personal property in payment of the corporation's taxes because the corporation was the alter ego of Mr. Wolfe, thus justifying the piercing of the corporate veil.

Mr. Wolfe also contends that certain penalties were improperly assessed against the corporation because the acts giving rise to the penalties were due to reasonable cause and not due to willful neglect. The Service contends that the reasons put forth by the plaintiff to avoid the imposition of penalties are insufficient.

DISCUSSION

The primary issue in this case is whether the corporation was the alter ego of Mr. Wolfe. If it was, then the corporate veil can be pierced, and the Service can look to Mr. Wolfe's personal assets as a source of payment of the corporation's taxes.

As a general rule, a corporation is treated as a legal entity, separate and distinct from its shareholders. The corporation alone is held accountable for its debts, and the shareholders enjoy limited liability.

When the corporate entity is abused, however, the protection of limited liability may be lost. In such cases, courts may exercise their equitable powers to pierce the corporate veil. Since the doctrine is an equitable one, there is no general formula to fit all cases. Rather, the conditions under which a corporate entity will be disregarded vary according to the circumstances of each case.

A summary of the case law identifies a number of factors upon which courts have relied in deciding whether to pierce a corporate veil. Although no single factor or set of factors is determinative, a variety of combinations of the following factors may indicate that the corporation is the alter ego of its controlling shareholder:

1. Shareholder owns all or most of the corporation's stock.
2. Shareholder is a director and/or the president of the corporation.
3. Shareholder makes all corporate decisions without consulting the other directors or officers.
4. Shareholder, officers and/or directors fail to comply with the statutory requirements regarding operation of the corporation.
5. Shareholder's personal funds are comingled with the corporation's funds.
6. Shareholder's personal credit and corporation's credit are used interchangeably to obtain personal and corporate loans.
7. Shareholder's personal business records are not kept separate from corporation's business records.

8. Shareholder and corporation engage in the same type of business.
9. Shareholder and corporation have the same address.
10. Shareholder admits to third parties that the shareholder and the corporation are one and the same.
11. Corporation's profits and earnings are distributed through means other than dividends.

See, Piercing The Corporate Veil, 44 Mont.L.Rev. 91 (1983).

The facts of the instant case present the classic case of a shareholder so pervasively dominating corporate affairs that the shareholder and the corporate no longer have separate identities. Mr. Wolfe admitted in his deposition that "[a]ll the thing [corporation] amounted to was actually a screen." Mr. Wolfe was the sole shareholder of the corporation. Mr. Wolfe was a director and the president of the corporation. Mr. Wolfe made all the corporate decisions without consulting the other directors. The corporation did not even have a bank account. All the corporation's banking transactions were done through the proprietorship's bank account. The corporation did not have its own telephone. The corporation and the proprietorship were housed in the same office. The corporation's employee was paid by the proprietorship. Some of the corporation's equipment was purchased on the proprietorship's credit. All of the corporation's purchases were paid for on a proprietorship bank account. When the corporation received payment from third parties, the money was deposited into the proprietorship's bank account. Even Mr. Wolfe could not distinguish between the corporation and the proprietorship. Mr. Wolfe admitted in his deposition that "I don't really see how a person could go down through this thing and technically separate the two [the corporation and the proprietorship]." When asked if he considered the corporation and the proprietorship to be the same thing, he responded: "Yes."

It is clear that the corporation and the proprietorship were operated as a single instrumentality under the sole control of Mr. Wolfe. Therefore, it was proper for the Service to look to Mr. Wolfe's personal assets to satisfy the taxes of his alter ego corporation. *Terrapin Leasing, Ltd. v. United States*, 81-1 U.S.T.C. ¶ 9372 (10th Cir. 1981); *Valley Finance v. United States*, 629 F.2d 162 (D.C. Cir. 1980); *AVCO Delta Corp. v. United States*, 540 F.2d 258 (7th Cir. 1976), *cert. denied*, 429 U.S. 1040 (1977).

Mr. Wolfe contends that the Service acted improperly because the taxes were never assessed against him personally. The Seventh Circuit has discussed the issue of whether a second assessment has to be made upon the alternate party when an alter ego theory is being pursued. The Court held that a "distinction must be drawn upon the basis of whether the corporate entity is being disregarded for the purpose of assessing taxes or for the purpose of collecting liabilities." *AVCO Delta Corp. v. United States*, 540 F.2d 258, 264, n. 5 (7th Cir. 1976), *cert. denied*, 429 U.S. 1040 (1977). The Court held that if the corporate veil is being pierced for the purpose of assessing taxes, there must be a finding of "no business purpose," *Id.*, at 264. However, if the corporate veil is being pierced for the purpose of satisfying liabilities, such as taxes which have already been assessed, then this was not a tax theory but rather a theory available to any creditor, and a separate assessment of taxes is not required. *Id.*

Here, the Service is not asserting that the corporate entity should be disregarded for purposes of assessing taxes. It is a stipulated fact that the taxes were correctly assessed against the corporation. The Service is seeking to pierce the corporate veil only for purposes of collecting a liability.

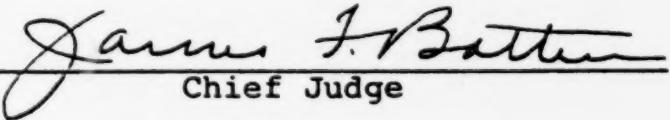
Mr. Wolfe contends that the penalties assessed against the corporation for failure to report and pay taxes were improperly assessed because there was reasonable cause for failing to do so. Mr. Wolfe contends that because of financial difficulties due to the Arab oil embargo and the fact that the person who normally prepared the returns was sick for a few months the corporation had reasonable cause not to comply with the tax laws.

The penalties in issue were imposed under 26 C.F.R. § § 6651(a) (1), (2), and 6656. All three sections provide for imposition of the penalties "unless it is shown that such failure [to file or to pay] is due to reasonable cause and not due to willful neglect." Neither economic difficulties nor the illness of an employee constitute reasonable cause for failure to file returns or pay taxes. *Robinson's Dairy, Inc. v. Comm'r*, 35 T.C. 601 (1961), *aff'd*, 302 F.2d 42 (10th Cir. 1962). Almost every non-willful failure to pay taxes is the result of financial difficulties. But to allow businesses to postpone filing returns and paying taxes until economic conditions improve would severely restrict the Service's ability to raise revenue for the operation of the federal government. Moreover, as the corporation continued in business into March

of 1976, it appears that the corporation was merely preferring other creditors over the United States. The taxpayer has the burden of showing that there was reasonable cause, *United States v. Rexach*, 482 F.2d 10 (1st Cir. 1973), *cert. denied*, 414 U.S. 1039 (1973), and he has failed to do so.

The Court will issue an order conforming to this memorandum opinion.

Done and dated this 22nd day of May, 1985.


Chief Judge

3
No. 86-1576

Supreme Court, U.S.

FILED

MAY 27 1987

JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1986

CHARLES E. WOLFE, PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT*

**BRIEF FOR THE UNITED STATES
IN OPPOSITION**

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QUESTIONS PRESENTED

1. Whether the IRS can collect a corporation's tax liability by levying against property held in the name of its sole shareholder, but imputed to the corporation under the "alter ego" doctrine, without making a separate assessment against the shareholder.

2. Whether petitioner's corporation was his "alter ego" under Montana law, thereby making his assets available to satisfy the corporation's tax liabilities.

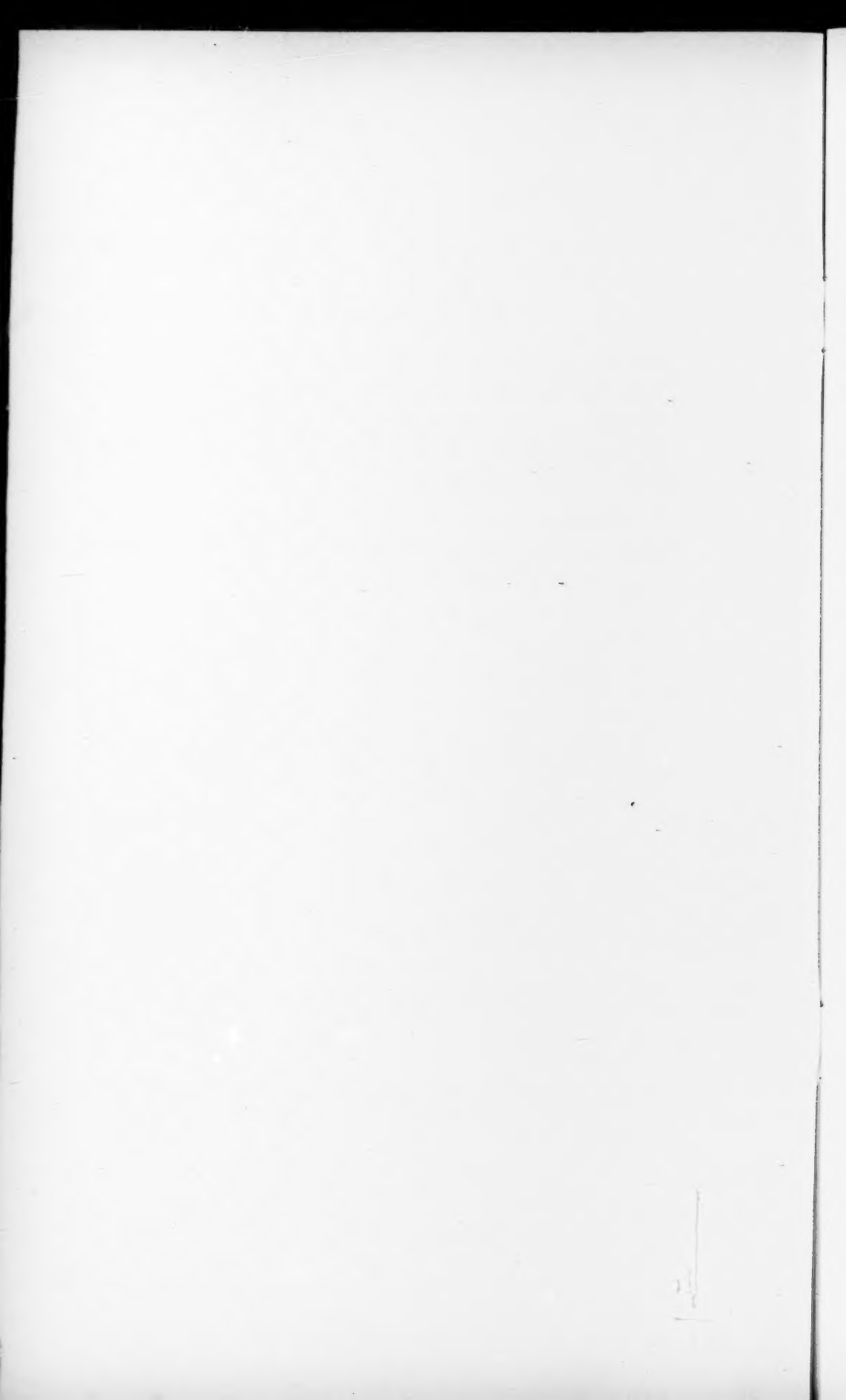


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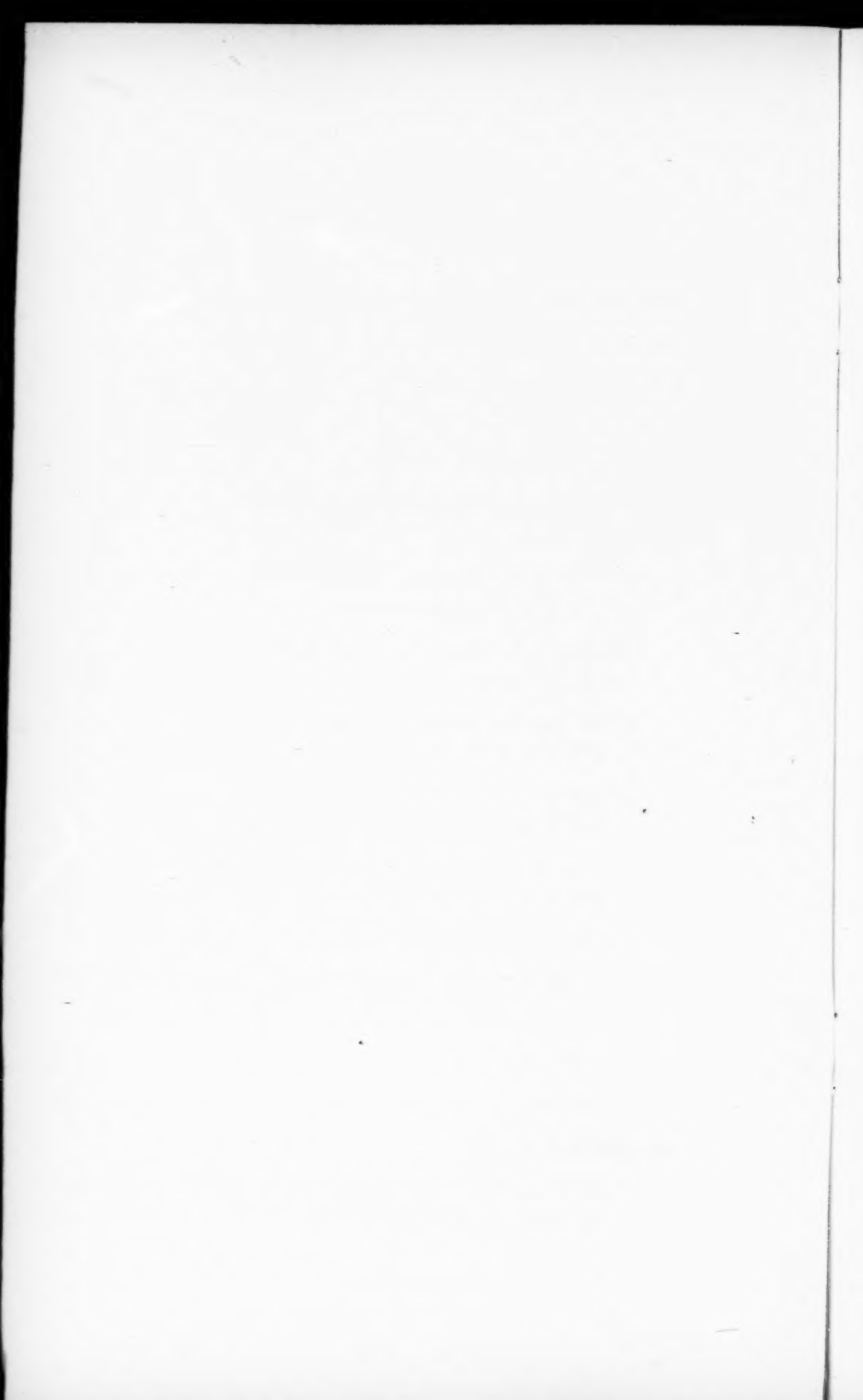
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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 18-24) is reported at 798 F.2d 1241. The order of the court of appeals on rehearing amending its original opinion (Pet. App. 24-26) is not reported. The opinion of the district court is reported at 612 F. Supp. 605 (Pet. Supp. App. 1-5).

JURISDICTION

The judgment of the court of appeals was entered on August 29, 1986. A petition for rehearing was denied on December 29, 1986 (Pet. App. 24-26). The petition for a writ of certiorari was filed on March 26, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The parties stipulated to the facts and exhibits in this case. Petitioner was the sole shareholder and president of Wolfe & Co., Inc. ("the corporation"), which leased tractor-trailers. Petitioner also operated as a sole proprietorship an

"over-the-road" trucking business known as Evergreen Express ("the proprietorship"). Petitioner did not maintain a separate bank account for the corporation. He deposited all revenues generated by the corporation into his own bank account. However, he charged the corporation not only with wages and employment taxes generated by the corporation, but also with wages and employment taxes generated by the proprietorship. Pet. App. 19.

During 1974-1976, the corporation accumulated a sizable federal tax liability for employment, diesel fuel, and highway use taxes. As of January 27, 1977, the outstanding amount of unpaid taxes was \$80,712.38, including penalties, fees and interest. This amount was assessed against the corporation, but, after notice and demand, it failed to pay the outstanding liability. The IRS then levied on ICC permits used in petitioner's unincorporated trucking business by issuing a levy on that property and by serving notices of levy upon the ICC and two prospective buyers of the permits. Petitioner ultimately satisfied the corporation's outstanding tax liability, which at the time had increased to \$114,472.91, and obtained a release of the levy on the ICC permits. Pet. App. 19.

2. Petitioner thereafter brought this refund suit in the United States District Court for the District of Montana, alleging that the levy was invalid because he was not personally liable for the corporation's taxes and because no assessment had been made against him. The district court granted the government's motion for summary judgment (Pet. Supp. App. 1-5). The court concluded that the government could satisfy the corporation's outstanding federal tax liability from petitioner's assets by using the "alter ego" doctrine to pierce the corporate veil of his corporation (*id.* at 2-3). The court also rejected petitioner's reliance on the fact that the government had not made a separate assessment of the corporation's tax liability

against him personally. It explained that the alter ego theory for piercing the corporate veil is "not a tax theory but rather a theory available to any creditor, and a separate assessment of tax is not required" (*id.* at 4).

The court of appeals unanimously affirmed (Pet. App. 18-24). Noting that the "government stands in a position analogous to any creditor seeking to collect debts owed by the corporation" (*id.* at 21), the court held that the alter ego doctrine could be invoked in an appropriate case to make a shareholder liable for his corporation's taxes (*id.* at 19-21). On these facts, the court concluded that it was correct to treat petitioner as the alter ego of his corporation under Montana law (*id.* at 21-22). The court also rejected petitioner's argument that a levy can be made against property in the possession of a third party only if that party has been assessed for the taxes owed by the taxpayer, stating that "levies can be effected against any person in possession of the taxpayer's property" (*id.* at 23).

ARGUMENT

1. Petitioner contends (Pet. 9-15) that the levy against his property was invalid because the unpaid taxes were not assessed against him personally. This contention is without merit.

The Internal Revenue Code provides that when a taxpayer against whom an assessment is made fails to make payment after notice and demand, the government may collect such tax by levy upon the taxpayer's property. 26 U.S.C. 6331(a). "[A]ny person in possession of * * * property subject to levy" is required to turn over that property to the IRS upon request. 26 U.S.C. 6332. As a procedural matter, that request is "made by serving a notice of levy on any person in possession of * * * property subject to levy." Treas. Reg. § 301.6331-1(a)(1). Thus, it is established beyond doubt that a levy may be made against a taxpayer's

property in the hands of a third party, even if no assessment was ever made against the third party.

This is the procedure that was followed here. After the corporation failed to pay its taxes following assessment, notice, and demand, the IRS sought to collect those taxes by levy against its property (ICC permits that were regarded as its property under an alter ego theory) in the hands of a third party.¹ This was accomplished by directing a levy to petitioner, who held the permits, and by serving protective notices of levy upon the ICC and upon the trucking companies that were prospective purchasers of the permits.

Petitioner's objection to this procedure is somewhat obscure. Certainly, there is nothing in *United States v. National Bank of Commerce*, 472 U.S. 713 (1985), that calls this procedure into question (cf. Pet. 14-15). To the contrary, that case explains that the service of a notice of levy upon a third party gives the government "the right to all property levied upon * * * and creates a custodial relationship between the person holding the property and the IRS so that the property comes into the constructive possession of the Government" (472 U.S. at 720), even though an assessment has not been made against the third party. *National Bank of Commerce* provides no support for petitioner's confusing effort to draw a distinction between a "levy" and a "notice of levy" (see Pet. 14-15); as the court of appeals explained (Pet. App. 23), "a notice of levy is simply a means of effecting a levy against persons in possession of taxpayer property." And the fact that the government

¹When property is correctly regarded as the taxpayer's property under an alter ego theory, there is no doubt that the government may levy upon that property to satisfy the taxpayer's outstanding tax liabilities just as if the property were held in the taxpayer's name. See *G.M. Leasing Corp. v. United States*, 429 U.S. 338, 350-351 (1977).

sought to satisfy the corporation's tax liabilities by resorting to petitioner's assets under an alter ego theory did not give rise to a distinct requirement that an assessment be made against petitioner. As the district court explained (Pet. Supp. App. 4), the government was simply seeking to collect its debt like any other creditor; it was not finding that petitioner as an individual owed any tax, and therefore its collection activity did not give rise to any requirement that a new assessment be made.

2. The underlying basis for all of petitioner's objections here appears to be his contention (Pet. 15-16) that the courts below erred in holding that the "alter ego" doctrine justified the levy on the ICC permits to satisfy the corporation's tax liability. If the permits could not be regarded as the corporation's property, then the government could not levy against the permits in satisfaction of the corporation's tax. The courts below concluded, however, that, under Montana law, the "alter ego" doctrine was applicable here and permitted the government as creditor to satisfy the corporation's tax debt by resorting to assets held in petitioner's name. This determination was correct and, moreover, represents a construction of state law that in any event would not warrant review by this Court.²

The district court carefully analyzed the factors underlying the "alter ego" doctrine in Montana and concluded that "the instant case present[s] the classic case of a shareholder so pervasively dominating corporate affairs that the shareholder and the corporation no longer have separate identities" (Pet. Supp. App. 3). The court emphasized that petitioner was the sole shareholder as well as director and

²As the court of appeals stated on rehearing (Pet. App. 25), the federal courts have sometimes resorted to federal common law in making an "alter ego" determination, depending on "the degree to which the subject matter of the case implicates federal interests." In this case, petitioner has never disputed the lower courts' application of Montana law to resolve the alter ego question (*ibid.*).

president of the corporation, that the corporation had no bank account of its own, that all banking transactions were carried out through the proprietorship, that the wages of the corporation's employees were paid by the proprietorship, that all purchases on behalf of the corporation were paid for by the proprietorship, and that all third-party payments to the corporation were deposited into the proprietorship's bank account (*ibid.*). In these circumstances, the court of appeals was plainly correct in finding that the evidence "was overwhelmingly sufficient to support the finding by the district court that [petitioner] was the alter ego of his corporation" (Pet. App. 23).³ See generally *E.C.A. Environmental Management v. Toenyes*, 679 P.2d 213, 218-219 (Mont. 1984); *Flemmer v. Ming*, 621 P.2d 1038 (Mont. 1980); *Stromberg v. Seaton Ranch Co.*, 160 Mont. 293, 502 P.2d 41 (1972); Comment, *Piercing the Corporate Veil in Montana*, 44 Mont. L. Rev. 92 (1983).

Petitioner's contention (Pet. 15-16) that an alter ego finding could justify resort to the corporation's assets to satisfy the individual's liability, but not resort to the individual's assets to satisfy the corporation's liability, is wholly without merit. The conclusion that the corporation was an "alter ego" of petitioner was a finding that "the corporation and the proprietorship were operated as a single instrumentality under the sole control of [petitioner]" (Pet. Supp. App. 3). It logically follows from the inseparability of petitioner and his corporation that the assets of one should be available to satisfy the liabilities of the other, and petitioner cites no authority suggesting a contrary conclusion.

³Given the strength of the undisputed evidence supporting the alter ego finding, the court of appeals expressly did not consider admissions made in petitioner's deposition that the corporate form was a "screen" and that it was impossible to separate the business that he operated in corporate form from the business that he operated as a sole proprietorship. See Pet. App. 22.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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